REFERENCE GUIDE

RESPONDING TO UNION INFORMATION REQUESTS FOR OVERTIME RECORDS

PURPOSE

The purpose of this guide is to provide a summary of pertinent case law regarding union requests for information under the Federal Service Labor-Management Relations Statute and to offer suggestions as to how to proceed if a union files an information request for overtime records and related documents pursuant to overtime grievances challenging compliance with the Fair Labor Standards Act.

BACKGROUND

Federal Labor Relations Authority (FLRA or Authority) case law has held that compliance with the provisions of the Fair Labor Standards Act, 29 U.S.C. Sec 201 (FLSA), is subject to the negotiated grievance and arbitration procedures. This includes both the determination of whether employees are properly classified as exempt from the provisions of the Act, as well as whether overtime was properly paid under the Act. See, e.g. DHHS, SSA, Baltimore and AFGE, 44 FLRA 773 (1992); NTEU and FDIC, 53 FLRA 1469 (1998). The Back Pay Act, 5 U.S.C. 5596, authorizes back pay for employees wrongly denied overtime pay under FLSA. Several cases have resulted in changes to employee FLSA designations and significant amounts of back pay, which can include liquidated damages under the provisions of FLSA.

An agency's duty to provide information to a union is established under the Federal Service Labor-Management Relations Statute (the Statute) in 5 U.S.C. § 7114(b) (4) which states:

> b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—
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> . . . . . .

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
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> (A) which is normally maintained by the agency in the regular course of business;
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> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
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> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

The specific requirements and parameters of this statutory requirement and the relationship between section 7114(b) (4) of the Statute and the Privacy Act and Freedom of Information Act have been delineated by the FLRA in several seminal cases.

It is important to note that FLRA case law holds that unions have a right to relevant and necessary information in order to both process grievances and arbitrations, and to determine whether or not there is sufficient basis to even file a grievance. See Dept of Justice, INS, Border Patrol, El Paso and AFGE, National Border Patrol Council, 37 FLRA 1310 (1990). Thus, requests for information can be expected in connection with grievances or potential grievances over FLSA matters. So long as the provisions of the Statute are met, an Agency has an obligation to provide the union with overtime and compensatory time data. See AAFES, Lowry AFB Exch and AFGE Local 2865, 13 FLRA 392 (1983). Generally, management must provide relevant and necessary information to a labor organization even if it believes that the grievance is untimely or outside the scope of the grievance procedure. See DMA and NFFE Local 1827, 21 FLRA 595 (1985). The exception arises in situations, such as the separation of a probationary employee, where the matter is not grievable as a matter of law. See Department of the Treasury, IRS and NTEU, 21 FLRA 646 (1983).

Summary of Items Normally Contained in Information Requests Regarding Overtime Grievances

A review of several information requests submitted in connection with overtime grievances reveals that some or all of the following items are commonly sought. Often the requests include information going back several years

- Listing of unit employees including position title, position description number, job series, grade, step and FLSA designation (exempt or nonexempt)
- Work addresses, email addresses, and phone numbers of unit employees
- Historic data on former unit employees who are no longer in the unit, including home addresses, phone numbers, email addresses, etc
- For exempt employees, the specific category under which the employee is exempt (executive, administrative, or professional) and any documentation or analysis that supported the specific exemption determination. This sometimes includes a request for information on the specific individual who made the exemption determination.
- Copies of all statutes, regulations, instructions, or other guidance documentation (agency, component or local) that the agency followed in making exemption determinations
- Copies of current and former position descriptions for each unit employee including dates of promotion or other personnel actions that resulted in a change to the position description (often includes request for specific SF-50s)
- Email or other internal organizational communications regarding FLSA matters and organizational compliance with FLSA requirements
- Listings of all overtime earned by each unit employee including the date/pay period in which the overtime was worked, the amount of the overtime pay received, the employee's PD number, job series, grade, step and FLSA status (E or N).
- Listings of all compensatory time earned and used by each unit employee, including date/pay period, PD number, job series, grade, step and FLSA status.
- Similar information on credit hours earned and used by unit employees
- Copies of all standardized forms used for any purpose relating to requesting or approving overtime, compensatory time or credit hours for unit employees.
- Copies of any regulations, instructions, or guidelines provided to supervisors regarding approval or denial of requests for overtime, compensatory time, or credit hours for unit employees
- Current and historic data concerning unit employee arrival and departure information such as sign in-sign out sheets, scanning system records, or building access records
- Current and historic time keeping records for unit employees, such as time clocks, automated time sheets, etc
- Current and historic travel vouchers or other travel records for unit employees
- Records containing the official work schedules for all unit employees (regular or AWS, including compressed schedules and flexible work schedules)

Relevant Federal Labor Relations Authority Decisions on Requests for Information

Introduction:

Initially, it should be noted that management should always respond to a union request for information if only to acknowledge that it has received the request. It is an unfair labor practice to fail to respond to an information request even if there is no actual obligation to provide the requested information. See, e.g. EEOC and Nat'l Council of EPA Locals, 51 FLRA 248 (1995).

There are several key responsibilities imposed on the parties in making and responding to an information request. The extent to which these considerations are met determines whether the agency has an obligation to provide the requested information and, if it does not, whether the failure or refusal to do so constitutes an unfair labor practice.

1) The Sufficiency of the Union's Request:

In IRS, Washington, DC and IRS, Kansas City Service Center, Kansas City, Missouri and NTEU, Chapter 66, 50 FLRA 661 (1995) (IRS, Kansas City), the Authority established the particularized need standard for information requests. In this case, the Authority held that a union, under section 7114(b) (4) of the Statute, must:

> "establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute. The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, a union must establish that requested information is 'required in order for the union adequately to represent its members.'"

Thus, under the FLRA's case law the union must explain in detail why it needs the requested information so that the Agency can sufficiently analyze the request to determine whether the information must be disclosed under the Statute. The union must show that the requested information is necessary and not merely useful or relevant. In demonstrating a particularized need, the union must describe, with specificity, how it will use the requested information and how this use of the information assists the union in fulfilling its representational responsibilities under the Statute. Further, the union's articulation of a particularized must be made at, or near, the time of the request. See Dept

of the Air Force, Scott Air Force Base, Illinois and NAGE Local R7-23, 51 FLRA 675 (1996)

In light of the requirement to establish a particularized need for an information request, management representatives are encouraged to seek clarification when it is not readily apparent what the particularized need is. A request for a more clear and complete statement of particularized need is not an unfair labor practice and may help the Agency make an informed decision regarding its obligation under the Statute.

2) The Sufficiency of the Agency's Response/Countervailing Interests in Not Disclosing the Requested Information:

The respective responsibilities of the parties in making, and responding to, information requests is discussed at significant length in Dept of Justice, INS and Nat'l Border Patrol Council, AFGE, 51 FLRA 1467 (1996). An agency must always respond to a request and its burden goes beyond saying "no." If the agency is denying the request, it must provide clear and specific reasons for doing so. For example, if it believes that the information is not necessary or that an anti-disclosure interest exists that precludes the disclosure of the sought information, it must clearly articulate the basis for the denial. In considering this response, the agency should be aware that it will need to fully describe its anti-disclosure interests and then establish that these interests are controlling and outweigh the union's interest in disclosure.

One of the strongest countervailing interests is that disclosure would violate another law, rule or regulation. For example, in U.S. EEOC and AFGE, National Council of EEOC Locals No. 216 and Local 3614, 51 FLRA 248 (1995), the union requested employees' unsanitized performance ratings and summaries. The agency asserted that the release of these performance ratings with employee names would constitute an invasion of personal privacy within the meaning of the Freedom of Information Act Exemption 6 and was prohibited by the Privacy Act. The Authority agreed that the agency had established the claimed anti-disclosure interests and had no statutory obligation to provide the information. It stated that an Agency asserting that the Privacy Act bars disclosure must demonstrate that the information requested is contained in a 'system of records' within the meaning of the Privacy Act and that disclosure of the information would implicate employee privacy interests It must also state the nature and significance of those privacy interests. See also Dept of Transportation, FAA, New York TRACON, 50 FLRA 338 (1995).

If the parties involved with the information request can not agree on whether or not requested information should be provided, the FLRA will find that an unfair labor practice has been committed when:

1) The union has established a particularized need for the requested information;

2) The agency has not demonstrated a countervailing interest in not disclosing the information; or,

3) The agency has shown that an interest in not disclosing the information exists "but it does not outweigh the union's demonstration of particularized need." IRS, Kansas City, 50 FLRA 661, at 670 (1995).

DISCUSSION AND ANALYSIS: INFORMATION REQUESTS REGARDING OVERTIME

Recently, we have become aware of a number of union requests for information pertaining to overtime relating to bargaining unit employees. These requests are generally very broad and seek any information that might provide supporting documentation for the union to use against the Agency in a grievance. The information requests will go to both the basis for designating specific positions as being exempt or non-exempt from FLSA as well as information regarding hours of work, prior overtime or compensatory time, or any other material on which a claim for back pay can be based. Some of the specific types of information requested are listed above.

In light of FLRA case law, there are certain issues that should be addressed in any agency analysis and response to a union's information request concerning overtime. It is important to remember that each information request situation is different and needs to be evaluated on its own particular facts and circumstances. Nevertheless, the following suggested questions and approaches represent general guidelines that might be relevant in assisting you in replying to specific overtime information requests. Also, please insure that any actual responses are consistent with your component or activity information request procedures, systems and privacy protocols.

Application of Case Law Principles to Common Overtime Information Requests: Questions, and Possible Responses

1) Did the union establish a particularized need for the information? Did the union specifically explain how it would use the information to represent employees as their exclusive representative?

For example, if you are asked for a list of current bargaining unit employees' names, positions, job or position titles, work addresses, position description numbers, and FLSA exemption status (Exempt or Non-exempt, E or N, etc.), you should initially determine if the union has demonstrated a particularized need for this specific information. Has the union shown that this information is necessary? If the union states that it needs this information to review or evaluate the legal sufficiency of the FLSA designations, or to determine who it needs to interview in support of a grievance, arbitration or potential grievance, the union would seem to have demonstrated both relevance and a particularized need for the information. However, the agency representative may engage the union and explore alternatives for providing the information, e.g. hard or paper copies, on disk, or in an electronic format. Sometimes this can be used to reduce the administrative burden on the agency.

In at least once instance, the union sought such information for not only current employees, but former employees, going back three years from the date of the grievance. This raises a different particularized need issue. Since the union only represents employees currently in the bargaining unit, and the collective bargaining agreement and grievance procedure only cover employees in the unit, you might probe for why information on former employees is relevant or necessary to pursuing a grievance. In all likelihood, it will be difficult for the union to establish a particularized need.

Another example of an area where a particularized need may not exist is if the union requests information on credit hours earned or used by bargaining unit employees. Under the provisions of 5 U.S.C. Sec 6121, credit hours are excluded from the definition of overtime. Likewise 5 U.S.C. 6123 (b) provides that there are very limited circumstances under which an employee can be compensated for credit hours. It is important to note that credit hours are voluntarily worked by employees and are distinguishable from overtime or compensatory time situations where employees are directed to work. You should push back on union requests for credit hour information because a particularized need for this information does not appear to exist.

2) Is the union's request specific enough to allow the agency to make a reasoned judgment as to whether the requested information must be disclosed under section 7114(b) (4)?

For example, if you are asked for all computer access records for the past 6 years demonstrating log-in times and associated employee badge numbers, employee names, PIN access codes, or other employee identifiers, you should consider asking the union why it needs this information. In responding to management's question, the union needs to show how **each** of the requested information items is necessary to the performance of its representational functions in representing bargaining unit employees in a grievance over FLSA overtime. If the union merely provides a general statement that the information will be used to support the grievance, the representative should attempt to clarify exactly why all of this data is necessary for the union to process the grievance or to support the presentation of the grievance. It is not manifestly clear that all of the requested materials are necessary to evaluate and process an overtime grievance, nor is it clear that information on all bargaining unit employees, regardless of FLSA exemption status, would be appropriate for disclosure. Further, even if some of the content might be relevant and necessary, the 6 year time period far exceeds the time covered by the grievance and any back pay entitlement. It should be noted that the Authority has held that where a union fails to establish a need for all of the information requested, an agency is not required to provide the requested information even if the union has demonstrated a need for some of the information. The Agency need only turn over the material for which the need has been established. See, e.g. U.S. Dept. of the Air Force, Air Force Material Command, Kirtland AFB, and AFGE, Local 2263, 60 FLRA 791 (2005).

If the union is requested to clarify the particularized need for this information, and either fails to respond to the request or fails to provide a legally sufficient justification for all of the items requested, the Authority will likely find that the agency has not committed an unfair labor practice if it does not provide the information. See, e.g., U.S. EEOC and AFGE, National Council of EEOC Locals No. 216 and Local 3614, 51 FLRA 248 (1995); U.S. Dept. of the Treasury, IRS and NTEU, 51 FLRA 1391 (1996) (union did not timely demonstrate why it needed the requested information).

3) Does the requested information exist? Can the agency communicate with the union and suggest alternative methods of obtaining the requested information?

In the context of an overtime grievance, it is reasonable to expect that the union will request any laws, rules, regulations, local instructions, guidance or direction that the Agency relied on in making FLSA exemption determinations.

The Agency's obligation is to provide documents that are already in existence or which can be compiled from electronic or other records that the agency maintains in the regular course of business. See Div of Military and Naval Affairs, State of New York and New

York State Council of Ass'n of Civilian Technicians, 8 FLRA 307(1982). The FLRA has generally held that an agency is not relieved from the duty to provide information just because the union could easily obtain it from an alternative source. However, rather than go through the time and effort of copying such documents, it is submitted that an Agency can "furnish" publicly available data, such as the provisions of the Fair Labor Standards Act or implementing regulations from the Dept of Labor or Office of Personnel Management by providing the union with a link to public websites where the information can be found. For example, statutory sections pertaining to the FLSA are published on the web at www.thomas.gov, copies of FLRA cases may be obtained via the web at www.flra.gov, etc.

In the above-referenced example, it is unlikely that there would be separate local activity instructions or guidance of the type sought by the union. If the agency does not maintain the records sought in the union's request, it must nevertheless notify the union that no such records exist. See SSA, Baltimore and AFGE Local 1164, 39 FLRA 650 (1991).

A related issue that sometimes arises is how burdensome or time consuming it would be for the agency to compile the requested information. However, this has become less problematic as information is more frequently maintained electronically and can be pulled using spreadsheets and other software applications. Case law indicates that it is very difficult for management to show that information is not readily available, even if it may take significant time and resources to find and organize the material. See DHHS, SSA and AFGE Local 3302, 36 FLRA 943 (1990); Federal Bureau of Prisons and AFGE Local 171, 55 FLRA 1250 (2000).

An Agency representative can communicate with the union and suggest that alternative sources for obtaining the information are readily available. For example, if you are asked for the contact information for bargaining unit employees, such as their office phone numbers and email addresses, you should note that this information is available to the union through its activity-level representatives via the agency's Global address option on the Microsoft Outlook email program (check on your agency's policy regarding access to that function).

4) Can the agency demonstrate a countervailing interest in not disclosing the information?

It is critically important that the Agency protect personally identifiable information (PII), even in the face of a union request for information. PII should not be released under Section 7114(b)(4) of the Statute. For example, see the U.S. EEOC and AFGE, National

Council of EEOC Locals No. 216 and Local 3614 case, noted earlier, where the Authority found that the agency had not committed an unfair labor practice because it demonstrated that the public interests served by release of the requested information (unsanitized performance ratings) was outweighed by the substantial invasion of employees' privacy that would result from the release of the requested information.

PII has been defined by the Office of Management and Budget as "any information about an individual maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and information, that can be used to distinguish or trace an individual's identity, such as his or her name, Social Security number (SSN), date and place of birth, mother's maiden name, and biometric records, including any other personal information that is linked or linkable to an individual."

Employment records requested in an overtime-related information request could include PII data such as an employee's SSN or truncated SSN, his or her citizenship, legal status, date of birth, place of birth, sex, race, ethnicity, mother's maiden name, other names the employee may have used, home phone numbers, home mailing address, home email address, religious preference, marital status, or information concerning an employee's disability or medical condition.

Information that does not implicate PII can be released pursuant to an information request. This can include name, civilian grade, military rank, rate of pay, annual compensation, official government duty location, official government email address, work or office phone number, and an employee's job title.

Unions will often request prior overtime records including employee names, rates of pay, job or position titles, agency position numbers, position description numbers, job series, grades, steps, and FLSA exemption status (E or N). They can also request prior SF-50s or other documentation of personnel actions. While this information may be relevant and necessary, you need to be sensitive to PII considerations and sanitize any such information prior to disclosure. Of particular significance, please note that information cannot specifically identify employees and race/national origin data. Information could be separately provided by name and by RNO category, but they cannot be contained in the same document or linked in any way.

If you are asked for the names and home addresses of employees who are no longer employed by the agency, you should reference privacy provisions. You can also take the position that these individuals are no longer in the bargaining unit and are not covered by

the negotiated grievance procedure. Thus, there is no particularized need for the information. Also, in all likelihood, the agency does not have a system of records that tracks this information.

Another countervailing interest against disclosure that an Agency might be able to raise in appropriate situations is internal security.

CONCLUSION

Agency representatives should realize that each information request situation needs to be independently considered. The suggested approaches for questioning and evaluating union information requests submitted in connection with overtime grievances are guidelines that may or may not be applicable in any given situation

Further, Agency representatives are reminded to be aware of the FLRA requirements and case law regarding information requests and provide only information that is consistent with the statutory requirements. Key factors are:

- The union must articulate and establish a particularized need for each type of information that is requested.
- Information must be relevant in terms of the scope of the request and the time periods covered by the request
- Countervailing interests against disclosure must be considered. If information is not going to be provided because of such interests, the reason for non-disclosure must be articulated to the union.
- Where feasible, you should attempt to narrow the scope of the union's request and outline any alternatives, such as publicly available links, the union can use to obtain the information via less burdensome alternatives

If you have any questions, please contact the Labor Relations Team, at (703) 696-6301 or DSN 426-6301, press menu selection number 3.

REFERENCES

5 U.S.C. § 7114(b) (4) (B)
Federal Labor Relations Authority Decisions